

OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TAMARA B.,

Claimant,

vs.

NORTH LOS ANGELES COUNTY
REGIONAL CENTER,

Service Agency.

OAH No. L 2005100073

DECISION

On May 24, 2006, and November 2, 2006, this matter was heard by Administrative Law Judge Timothy S. Thomas (ALJ), Office of Administrative Hearings, in Van Nuys, California.

Designated lay representative Rene Urey represented Tamara B. (hereinafter claimant). Nora B. and Dario B., claimant's mother and father, appeared on May 24, 2006.

Rhonda Campbell, Contract Officer, represented the North Los Angeles County Regional Center (NLACRC, service agency or regional center).

The parties were permitted to file written post-hearing comments in response to additional reports and/or assessments that were submitted and received into evidence following the hearing on November 2, 2006. A Reply to Claimant's Physical and Occupational Therapy Assessments was received by the ALJ from the regional center on November 30, 2006. No comments were received from claimant. On December 18, 2006, the ALJ issued a Record of Proceedings¹ and served it on the parties. Comments on the accuracy of the record were invited. On December 19, 2006, comments from the regional center were received by the ALJ and technical changes to the record were made. No comments were received from claimant.

The matter was submitted for decision on January 5, 2007.

¹ No recording device was available to make a record of the proceedings on May 24, 2006, as required by Welfare and Institutions Code section 4712, subdivision (k). The parties waived that requirement and stipulated that the ALJ would draft a written Record of Proceedings in the form of a summary of the evidence, which would serve as the official record of the proceedings.

ISSUE

The issue presented by this matter is whether the regional center is obligated to fund the cost of swimming lessons for claimant in order to further the goal of improving her physical, sensory and/or gross motor skills.²

FACTUAL FINDINGS

1. Claimant is a nine-year-old girl who qualifies for regional center services on the basis that she is mildly mentally retarded. Her retardation is a result of microcephaly. She also has a seizure disorder that is controlled by medication. Her medical needs are met through Kaiser Permanente in Panorama City, where claimant regularly sees a pediatrician and a neurologist. Claimant attends special day classes at Danube Avenue School in Granada Hills, where she receives speech and occupational therapy and adaptive physical education. Claimant can write her name and count to 100 with prompting. Tami understands the concept of money, but confuses bills and coins.

2. Lupe Boulton has been claimant's service coordinator for five and one-half years. She testified that claimant's behavioral challenges have concerned her parents for all of that time. According to the IPP of July 26, 2005:

Mom and Dad recognize that Tami's behavioral challenges and her level of functioning do not allow her to participate in a mainstream activity without support with her peers. School has not been able to provide Tami with the appropriate social skills to be able to interact with other children. Mom and Dad would like Tami to be able to play cooperatively, learn to take turns, be able to express her wants and needs during playtime to her peers. Mom stated that Tami does not know how to make friends or initiate play. Tami's parents feel that an appropriate social skills group will allow Tami to grow and mature so that she will be able to become more social and develop her skills in an appropriate manner to allow her to integrate more within the community.

3. The Los Angeles Unified School District (LAUSD) was providing discrete trial training services, but the Individual Program Plan (IPP) team felt in January 2004, that the school district "has not been able to provide [claimant] with the appropriate social skills for her to be able to interact with other children." Claimant's parents wanted additional

² Claimant's original request for swimming lessons contended that the activity was necessary to improve her socialization skills and to help her integrate into the community. It was also suggested that swimming was a proper treatment modality for claimant's ongoing behavioral problems. However, during the course of the hearing claimant withdrew her request to the extent it was based upon those grounds, and the parties agreed to proceed on the premise that claimant contends the swimming lessons are needed to meet certain physical needs of claimant.

services directed at their daughter's behavioral issues. In March of 2005, the parents successfully completed a NLACRC-funded 16-hour training seminar conducted by California PsychCare, Inc. That entity authored a report dated April 6, 2005, which concluded: "The daily circumstances encountered by this family place the parents under extreme duress. Given their exceptional strain, specific programming is needed to address this family's issues thoroughly." NLACRC agreed to fund additional social skills training, which was implemented through Hand In Hand Family & Child Development Center in Encino. These weekly services, provided claimant in a group setting, were approved for continuation at the last IPP meeting in July 2005. In addition, because some time with the Hand In Hand program was missed due to vendor staffing problems, the regional center authorized a second social skills program for up to three hours per week until July 2006. Those sessions, with The Alliance Project, started in December 2005. Ms. Boulton also provided the family with a package of information about generic, community resources that may provide claimant with opportunities for social integration. Ms. Boulton testified that if claimant experienced difficulty accessing any of those services, the regional center could provide a 1:1 aide to assist her. To Ms. Boulton's knowledge, the family has not contacted any of the service agencies mentioned in the packet. Lastly, Ms. Boulton, in consultation with NLACRC psychologist Heike Ballmaier, arranged for an additional behavioral intervention assessment, which, according to Ms. Boulton, claimant's mother declined to approve.

4. At some point in time prior to the IPP of January 12, 2004, claimant's parents requested that regional center fund the cost of swimming lessons for claimant for the purpose of providing her with an opportunity for socialization. The lessons were provided by the Verdugo Hills YMCA. At the January 12, 2004 IPP meeting, NLACRC agreed to continue the lessons to further the goal of "community integration," a goal thought to be achieved as a result of claimant "greeting and speaking with other swimmers." The IPP also required that the YMCA provide the regional center with periodic status reports of claimant's progress in the swim program. A report dated January 30, 2004, indicated that claimant had been in the "water program for several years." It was reported that claimant "has gained more self-confidence in the water and is able to move herself in the water." She could blow bubbles, "assimilate doggy paddle stroke," enter the pool by the rail and play games with the instructor in the pool. The one-year goals set out for claimant were related to promoting water safety and the ability to swim. The long-range goal was said to be "going into a class with children her age. Semi private lessons might be a good way to see her interacting with other children and on her way to the long term goal of going into a normal class." The YMCA did not provide the regional center with a report after January 2004.

5. At the July 2005 IPP meeting, claimant requested that swimming lessons continue. By letter of August 12, 2005, the regional center formally denied the request. The denial of services letter described the discussion concerning the request for swimming lessons in the following terms:

Based on Tami's individual program plan (IPP) dated 1/12/04,
NLACRC authorized funding for the swimming program to

meet the goal of helping Tami become fully integrated in the community. Through the individual program plan (IPP) process on 7/26/05, you indicated that Tami continues to have social skills deficits, particularly in integrating into the community, initiating interactions with other children, and expressing her frustrations with peers in an appropriate manner. You expressed that Tami continues to exhibit maladaptive social behaviors that interfere with her full integration into community activities. ... [Y]ou reported that you attempted to have Tami participate in a group swimming program in order for her to have peer interaction opportunities, however you expressed that Tami was unsuccessful in integrating into this environment due to her behaviors and you then returned her to an individual swimming class away from peers. Your current goals for your pursuit of continued swimming lessons are 1) to provide Tami with an opportunity to socialize with other children, 2) to draw her into interaction with her peers, 3) to teach her how to work as a team member, 4) to integrate her into the community, and 5) to reinforce positive social behaviors.

The regional center cancelled the swimming lesson program and served a Notice of Proposed Action on August 12, 2005. NLACRC denied the requested service on the basis that swimming lessons are not appropriate services to address social skills or behavioral deficits, and because swimming lessons represent an activity that is typically a parental responsibility.

6. While the regional center was made aware of the family's concerns regarding sensory deficits or claimant's deficits in balance, coordination and strength at IPP meetings, the parents had not raised the issue in the context of swimming lessons prior to the commencement of this hearing. In order to assess a request that swimming lessons be approved to further the goals of improving claimant's balance, coordination or strength, the regional center's position was that Kaiser should first perform a formal assessment of the needs and provide the appropriate therapy to address those needs. If Kaiser were to deny such services, then the regional center would perform the assessment and in addition determine whether the school district ought to address claimant's needs through occupational therapy and/or physical therapy programs.³

7. John G. Youngbauer, who has a Ph.D. in developmental and child psychology, testified on behalf of the regional center, for which he is employed as the Supervisor of

³ Ms. Boulton testified that although she has requested a copy of claimant's Individualized Education Plan (IEP), the parents had not signed the necessary authorization to enable the regional center to access that material. It is noted, however, that the California Psychcare report of December 15, 2005, documents that both occupational and physical therapy services were being provided by the school district as of that time. (See Exhibit 11, page 3.) Eventually, the June 2004 IEP was obtained during the pendency of this matter and was marked and received as Exhibit 26.

Behavior Services. Dr. Youngbauer has not met claimant, but has reviewed various documents for the purpose of analyzing her request for swimming lessons. In his opinion, there is no evidence that swimming lessons will provide social skills training, particularly since it has not been shown that the YMCA swimming instructors have any expertise in providing such training. Rather, Dr. Youngbauer testified, such training is appropriately provided by an agency vendored for that purpose, such as Hand In Hand, which has done a good job with claimant based upon its periodic reports reviewed by the witness. Likewise, behavioral issues need to be addressed not by a swimming instructor, but by a vendor such as California Psychcare, Inc., through a behavioral modification program of some sort. Dr. Youngbauer does agree that whatever behavioral intervention is utilized for claimant should probably not be parental-based, in light of claimant's mother's severe asthma condition.

8. A letter was produced dated October 25, 2005, authored by Oved Fattal, M.D., claimant's pediatrician. The letter reads as follows:

Tamara [B.] suffers from idiopathic microcephaly and global developmental delay. She has had significant behavioral difficulties and self mutilatory behaviors such as biting and scratching her hands. She has benefited greatly from swim therapy. Her behaviors are notably different after attending these sessions. Please help this child out by providing her with these services.

Dr. Youngbauer opined that a behavioral assessment would need to be done to provide a "causal link" between a given therapy and the targeted behavior. Moreover, he has never known a pediatrician to conduct such an assessment, and questioned the use of the word "therapy" in connection with swimming lessons.

9. John Steinreich is the Consumer Services Supervisor at NLACRC and consults with his service coordinators regarding all denials of services. He is familiar with the regional center's service standards and with the Lanterman Act. In his testimony, Mr. Steinreich identified the service standard dealing with social and recreational activities, which are defined as activities that "help individuals to learn and develop age appropriate social skills," and "provide opportunities in both integrated and specialized settings to engage in hobbies, participate in recreational events, and pursue leisure interests." According to Mr. Steinreich and the NLACRC policy guidelines, the regional center does not normally fund the cost of recreational services, which "should be met through the natural involvement in one's family activities or residential service program," according to the policy.

With regard to finding the means of habilitation in the areas of sensory, balance, coordination and strength, Mr. Steinreich testified that physical therapy is ordinarily the service that would be identified by the regional center and that NLACRC would look to generic resources, the school district and private health insurance, to fund such services. He believes that the IPP team should meet to define the needs and goals in this area.

10. By agreement of the parties, the hearing was recessed and the IPP team met on June 15, 2006. No mention is made in the IPP report of swimming lessons or physical deficits to be addressed by a swimming program, as the IPP was not completed on June 15, 2006. Later in June 2006, the service coordinator sent the family copies of a news release concerning generic (free) swim programs offered through a Kaiser Permanente grant to the City of Los Angeles. "Operation Splash" was to be offered in 41 locations in Southern California in the summer months. No mention is made in the document (Exhibit 21) as to whether special programs or accommodations were to be made available to disabled individuals.

11. On July 25, 2006, an Assessment Report from the Vista Psychological Center of Santa Barbara (Vista) was prepared based on home, school and occupational therapy session observations made by case manager Tamara Cates and psychologist H. Keith Massel, Ph.D. The regional center had referred claimant to Vista for a discrete trial training (DTT) assessment due to continuing parental concerns about their daughter's behaviors and deficits in social and safety skills. The authors recommended both DTT and Pivotal Response Training. The assessment did not deal with claimant's physical deficits directly, nor did it touch on the role, if any, swimming ought to play in addressing claimant's needs.

12. NLACRC encountered some difficulty scheduling a physical therapy assessment for claimant following the first Fair Hearing session and the June 2006 IPP. The ID notes in evidence (Exhibit 23) indicate the assessment was to be done by a vendor named John Duran and/or Bright Star Physical Therapy.

13. Claimant submitted to a medical evaluation by NLACRC medical director Jaime D. Mejszenkier, M.D., on October 30, 2006. After conducting an interview with the father and conducting both physical and mental status examinations of claimant, Dr. Mejszenkier opined and testified that claimant suffers from "congenital encephalopathy secondary to microcephaly and hypoplastic corpus callosum." The condition manifests itself in claimant as mental retardation, mild diplegia and seizure disorder.

With respect to the need for swimming lessons, the child's father indicated to the doctor that he felt his daughter benefited by virtue of improved lower extremity strength and because when swimming she does not "suck on her hands."

The regional center's medical expert testified that in his opinion claimant does need and benefit from physical therapy, but that swimming, while a good activity for anyone, is not the best exercise to strengthen the legs. He sees exercising in a pool as good for individuals with very weak limbs or pain that is alleviated somewhat by being in the water.

14. On referral by LAUSD, a physical therapy evaluation was done by McCrory Pediatric Services in October 2006. Claimant's mother reported concern with her daughter's balance, strength, ambulatory skills and fatigue. During a school observation on October 12, 2006, the therapist noted that Tamara was seated appropriately at her desk for 25 minutes

with both feet on the floor. She transitioned in and out of her seat independently, without upper extremity support and without assistance. She demonstrated good balance while retrieving a fallen object from the floor. She also retrieved an object from a bookshelf without difficulty. Outside of the classroom, claimant independently navigated over various terrain conditions, including stairs, without loss of balance or assistance. Her gait velocity was normal. Claimant participated in adaptive physical education without loss of balance. Although she could not keep up with her peers, she maintained balance and demonstrated adequate endurance during a timed run. She was also able to walk backwards 10 steps without a loss of balance, throw and catch a ball, mount and dismount playground equipment and jump on a trampoline. She was, however, unable to skip.

Claimant demonstrated globally decreased muscle tone, postural deficiencies and motor planning and control impairments. But these deficiencies did not prevent her from succeeding in the school environment. Therefore, individualized, skilled physical therapy services were not recommended for her. The physical therapist/reporter did recommend “some type of general strengthening and conditioning program, such as swimming, adaptive gymnastics, or some other type of cardiovascular fitness group.” (See Exhibit 28.)

15. On October 24, 2006, claimant was seen at Kaiser Permanente for a “Physical/Occupational Therapy Referral and Treatment Plan.” The handwritten notes of the reviewing therapist conclude: “Pt. has delays in gross motor development complicated by autism/inability to follow directions. Pt. getting adaptive PE services through school system. No medical necessity for additional services at Kaiser.” (See Exhibit 28.)

16. On November 3, 2006, claimant was assessed by Bright Star Pediatric Physical Therapy. The author of the resultant report (Exhibit 27) found that claimant “is hypotonic in her trunk and lower extremities. Her upper extremities are very mildly hypotonic. She has poor static and dynamic balance in standing and ambulation. Her motor planning skills and praxis are poor.” The Bright Star therapist felt that claimant, a nine-year-old, was functioning at a 16 to 18-month level in her gross motor skills. She was reported to frequently fall and unable to run or jump or climb without difficulty. She can stand from the floor independently, but requires assistance to negotiate stairs and curbs. “Her overall endurance is very low.”

Bright Star concluded that claimant “would benefit greatly from ongoing therapy two to three times a week, with frequent reassessments. Due to Tamara’s poor endurance, decreased trunk control and stability problems she would do very well in aquatic physical therapy. When children initiate therapy, the exercises required of them are often difficult and taxing. When, however, done in water, they appear much easier, more fun and just as productive and beneficial. My personal recommendation would be for Tamara to have one session per week in the pool and one or two sessions in the clinic to work on the above mentioned problems.”

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LEGAL CONCLUSIONS

1. Claimant bears the burden of proving, by a preponderance of the evidence, that the funding for services sought is necessary to advance the goals of the IPP. (Evid. Code, §§ 500 and 115.)

2. The overriding policy statement found in the Lanterman Act⁴ is to do everything necessary to allow the developmentally disabled individual to be integrated into the community and become more independent. The State has “accepted a responsibility for persons with developmental disabilities and an obligation to them which it must discharge.” (§ 4501.) “The determination of which services and supports are necessary for each consumer shall be made ... on the basis of the needs and preferences of the consumer... and shall include consideration of a range of service options proposed by individual program plan participants.” (§ 4512, subd. (b).)

Furthermore, “it is the intent of the legislature that regional centers provide or secure family support services that do all of the following: (1) Respect and support the decision making authority of the family. (2) Be flexible and creative in meeting the unique and individual needs of families as they evolve over time.” (§ 4685, subd. (b).)

On the other hand, the decision to provide services and supports must also include an analysis of “the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.” (§ 4512, subd. (b).) The regional center and the consumer are bound to “consider all of the following when selecting a provider of consumer services and supports: (A) A provider’s ability to deliver quality services and supports which can accomplish all or a part of the consumer’s individual program plan. (B) A provider’s success in achieving the objectives set forth in the individual program plan. (C) Where appropriate, the existence of licensing, accreditation, or professional certification.” (§ 4648, subd. (a).)

3. Claimant’s experience in a swimming program at the Verdugo Hills YMCA logically promoted water safety. The original objectives of the program also included community integration and peer interaction. Claimant has asked that that program be reinstated for the purposes of physical therapy without offering any evidence that anyone at Verdugo Hills YMCA is qualified to provide such therapy. It cannot be persuasively argued that mere presence in a pool under the supervision of a swimming instructor qualifies as a form of physical therapy that will further an IPP goal, or serve to ameliorate any one of the deficiencies noted in recent reports, such as hypotonic extremities or poor gross motor skills.

4. On the other hand, the Bright Star report clearly indicates that a physical therapy program, perhaps including an aquatic component, is appropriate for this consumer. Claimant’s parents and/or representative and NLACRC should cooperatively identify a

⁴ Welfare and Institutions Code section 4500 *et seq.* All code sections hereafter shall refer to the Welfare and Institutions Code unless otherwise noted.

program best suited for claimant as well as a source for funding of the program. If it is determined that the therapies being provided through LAUSD are insufficient to meet claimant's needs, and if another generic source of funding cannot be identified, then regional center should pay for the services.

ORDER

Claimant's request that regional center fund the cost of swimming lessons for claimant is denied.

NOTICE

This is the final administrative decision in this matter, and both parties are bound by it. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days of this decision.

DATED: January 16, 2007

TIMOTHY S. THOMAS
Administrative Law Judge
Office of Administrative Hearings